BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	
LOCAL UNION NO. 18 OF SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,)
Charged Party,)
and)
TOTAL MECHANICAL) Case 30-CD-078120
Charging Party,)
and)
LOCAL UNION 601 STEAMFITTERS AND)
REFRIGERATION/SERVICE FITTERS,)
Intervenor.)

BRIEF ON BEHALF OF LOCAL UNION 601 STEAMFITTERS AND REFRIGERATION/SERVICE FITTERS

This brief is submitted in support of the Motion to Quash the Notice of Hearing that was orally presented on behalf of Intervenor Local Union No. 601 Steamfitters and Refrigeration/Service Fitters (Fitters Local 601 or "Local 601") at the hearing held on April 27, 2012 in Milwaukee, Wisconsin. There are three prerequisites before the Board may proceed under Section 10(k): (1) there must be competing claims to work in dispute; (2) one party must have used proscribed means to enforce its claim; and (3) there must not be an agreed upon method for the voluntary adjustment of the dispute. While the parties stipulate that no "agreed upon method" for the resolution of this dispute, we shall show that there are not competing

claims to work in dispute. We shall also demonstrate that there was no bona fide threat to use proscribed means by one of the parties. Rather, the letter sent by Sheet Metal Workers Local 18 purporting to strike was completely contrived and the product of collusion by Total Mechanical and Sheet Metal Workers Local 18.

I. PARTIES TO THE DISPUTE

Sheet Metal Workers International Association Local 18 (Sheet Metal Workers Local 18 or Local 18) is the charged party alleged to have violated 8(b)(4) of the Act by using proscribed means – threats of picketing – to maintain work assignments by Total Mechanical. See Board Ex. 1. Sheet Metal Workers Local 18 represents workers in the State of Wisconsin. Approximately 125 members of Local 18 are classified as Environmental Service Technicians (EST) and are employed in Milwaukee and Southeastern Wisconsin to perform service and maintenance work. (Landgraf Tr. 76.)

Intervenor Local No. 601, Steamfitters and Refrigeration Service Fitters Local 601 (Fitters Local 601 or Local 601) also has about 2,500 members in Milwaukee and 13 adjacent counties in Wisconsin. (La Mere Tr. 201.) Approximately sixty per cent of the membership of Local 601 perform construction work and forty per cent perform service work. (*Id.*) The General Counsel did not find cause to conclude the Local 601 had engaged in conduct proscribed by 8(b)(4) of the Act. As will be shown, Total Mechanical incorrectly has asserted that Local 601 made claims that service work be assigned to workers represented by Local 601 on an exclusive basis.

¹ These counties are Milwaukee, Ozaukee, Washington, Waukesha, Green, Jefferson, Lafayette, Rock, Columbia, Dane, Iowa, Marquette, Richland and Sauk.

Total Mechanical is an employer engaged in construction and service work throughout the state of Wisconsin. (Braun Tr. 116-117.) Total Mechanical filed the 8(b)(4) charges which triggered the Notice of 10(k) hearing. Approximately 70-80% of the work performed by Total Mechanical is construction. (Braun Tr. 120.) The construction work is performed by various crafts, including the Local 601 Construction Fitters, Local 18 construction employees. The service work is performed by employees represented by Local 18 and Local 601 on a non-exclusive basis. We shall demonstrate that the unfair labor practice charges filed by Total Mechanical were the final step of a carefully engineered scheme to embroil the Board in a dispute that is wholly contrived.

II. COLLECTIVE BARGAINING AGREEMENTS

Sheet Metal Workers Local 18 has been signatory to a series of state-wide collective bargaining agreements with the Sheet Metal and Air Conditioning Contractors of Association. (JT Ex. 2.) The current Local 18 agreement expires May 31, 2012. Fitters Local 601 has a collective bargaining relationship with the Plumbing and Mechanical Contractors' Association of Milwaukee and Southeastern Wisconsin (PMC). (JT Ex. 3.) The current contract expires May 31, 2012. It covers work in 13 counties in Wisconsin.

The two multi-employer associations that negotiate with Local 601 and Local 18 respectively are closely related and have formed an umbrella group called the Plumbing Mechanical Sheet Metal Contractors' Alliance (Contractors Alliance). (Lentz Tr. 27.) Many but not all of the signatories to the Local 18 agreement are also signatory to the Local 601 Agreement. (Lentz Tr. 32-33.) Total Mechanical is one of

the contractors signatory to the area-wide agreements with both Local 18 and Local 601. Tim Braun, the head of the Service Division of Total Mechanical was the President of PMC, the head of the bargaining committee, and the Co-Chairman of the Contractors Alliance in early 2012. (Lentz Tr. 29.)

A third agreement applies to these proceedings: the United Association National Service and Maintenance Agreement (NSMA). (JT. Ex. 3.) This Agreement is nation-wide in scope and is negotiated by the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (UA) and the Mechanical Service Contractors of America. In contrast to the Local 18 and Local 601 agreements which are negotiated and administered on the local level, the National Service Agreement is not negotiated or administered locally. As stated by the Business Manager of Local 601: "Local 601 does not negotiate or administer or enforce the National Agreement. My responsibilities begin and end with the local agreement that we negotiate." (La Mere Tr. 204.) Seven members of the PMC, including Total Mechanical, are signatory to both the Local 601 Agreement and the NSMA. See Charging Party Ex. 5.

The National Agreement offers contractors freedom of movement, to perform work anywhere in the country. It also has a no-strike, no lockout clause which is not coterminous with local agreements.² (La Mere Tr. 205.) As a result, when the Local 601 local agreement expires, the National Service Agreement bars strikes or lockouts on the part of the Local and those seven employers, including Total Mechanical who

² The practice has been for the parties to negotiate five year agreements. The current National Service Agreement has a termination date of July 31, 2015. There are circumstances that allow for the National Agreement to be terminated on the anniversary date of August 1 of each year of the contract. See Paragraph 84 of NSMA. JT Ex. 1.

are signatory to both the local agreement and the National Service Agreement. (La Mere Tr. 205.)

The three agreements relevant to these proceedings all cover service work. Each of these agreements would support a claim of exclusive jurisdiction over the work claimed to be in dispute. (Lentz Tr. 33; 74-75; Braun Tr. 153.)

Paragraph 11 of the NSMA provides:

11. This Agreement shall apply to and cover all work performed by the Employer, and all its subsidiaries and branches in the United States, in order to keep existing mechanical, refrigeration and plumbing systems within occupied facilities operating in an efficient manner. This work shall include the inspection, service, maintenance, start-up, testing, balancing, adjusting, repair, modification and replacement of mechanical, refrigeration or plumbing equipment including related piping connections and controls in addition to all other service, maintenance and operations work in order to meet customer obligations. Temporary systems are to be considered service work.

See JT Ex. 1.

The Local 601 Agreement at Part B, Article XXXI, Sections 31.1 and 31.2 also broadly covers service work.

Section 31.1: This Agreement covers the rate of pay, hours and working conditions of all Employees engaged in the installation and service of all refrigeration, HVAC and mechanical systems and component parts related to this Industry, including but not limited to fabrication, assembling, erection, installation, testing, balancing, dismantling, repairing, reconditioning, adjusting, altering, servicing and handling, unloading, distributing, rigging and hoisting of all materials and equipment by any methods, including all hangers and supports of every description, erection of walk-in coolers and all other work included in the trade jurisdiction of the International Union, as well as all work set forth in Appendix A, which is incorporated herein and made a part of this Agreement

Section 31.2: Mechanical service and maintenance work, either by contract or emergency call basis, includes the work relating to

evacuation, charging, startup, inspection, operating, maintenance and service calls necessary to keep a mechanical system of refrigeration, air conditioning, heating and/or ventilation or any other newly installed, remodeled, revamped or redesigned mechanical system in operational order. Mechanical service and maintenance shall include, but not be limited to, all the maintaining, cleaning, adjusting, repairing, overhauling, starting, balancing and loop checking of any system or component part thereof, including low voltage wiring, fiber optics, and any other instrument of controls, regardless of size or location, including all other service and maintenance work assigned to the Employer by the customer. Non-bargaining unit employees of the Employer, or the Employer's vendors, may offer advice of a technical nature related to diagnosing problems or for the purpose of instruction and training.

See JT Ex. 3.

The Local 18 Agreement provides at Article I, Section 1 that the Agreement covers all employees of the employer engaged in the "manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing of all ferrous and nonferrous metal work... and of all air-veyor systems and air handling systems... and all other work included in the jurisdictional claims of the Sheet Metal Workers International Association. See JT Ex. 2.

III. PAST PRACTICE

Total Mechanical has a long practice of assigning service work to employees of both locals who usually work alone but are sometimes paired up without regard to union affiliation. While Total Mechanical claims to have a preference of assigning this work on roughly equal basis to each of the Locals, at present Sheet Metal Workers Local 18 currently has roughly twice the numbers of workers employed when compared to Local 601. (Braun Tr. 148-149.)

Neither local has ever objected to the non-exclusive assignment of service work. No grievances have been filed by either local even though both locals were well aware that neither local was assigned the work exclusively. (Lentz Tr. 51.) Neither local has taken the position that either of the Local Agreements require that all of the service work be assigned to either of the locals on an exclusive basis. Likewise, no grievances have been filed pursuant to the UA NMSA relating to the scope of the Agreement. (Lentz Tr 71; La Mere Tr. 208-209.)

IV. THE MEETING OF OCTOBER 21, 2011

The members of the Labor Committee of the PMC invited the top officers of Fitters Local 601 to attend a dinner meeting on February 21, 2012. (Lentz Tr. 53; La Mere Tr. 207.) Among the attendees of the PMC was Tim Braun, the head of the Service Department of Total Mechanical and Peter Lentz, the executive director of PMC. (Lentz Tr. 53.) Kevin La Mere, the Business Manager of Local 601 and Joel Zielke, the Financial Secretary of Local 601 attended on behalf of the Union. (Lentz Tr. 54.)

The dinner meeting offered an opportunity for both sides to air their concerns in advance of negotiations for the local contract set to expire on May 31, 2012. When the Union had an opportunity to speak, La Mere expressed his opinion that the National Agreement covered all service work. He was careful to couch this in terms of the contractual scope of the National Agreement, and not the Local Agreement. (La Mere Tr. 208.)

La Mere did not make a demand that the work be assigned to Local 601. He also made no mention of filing a grievance, a lawsuit, or engaging in any economic

action or coercive step to secure the work. (Lentz Tr. 75-76; La Mere Tr. 208.) One contractor asked what would happen to the Sheet Metal Worker EST employees if the work was assigned to Local 601. La Mere responded that in that event Local 601 through an organizing initiative would be prepared to take the existing Local 18 workers as members of Local 601. (La Mere Tr. 210.)

La Mere's short statement of the scope of work of the National Agreement was met mostly with silence. One contractor told Zielke that he would be concerned with such an arrangement because there would be no safe harbor in the event of a strike. Zielke said that would not be a problem because the National Agreement's no-strike clause. (Zielke Tr. 195, 197.)

No extended debate occurred. (Lentz Tr. 56.) Local 601 took no steps in furtherance of the statement of the obvious that the work in question was covered by the National Agreement. No representative of Local 601 demanded that the work be reassigned. (La Mere Tr. 209.) In fact, there was no discussion of any kind between Local 601, the PMC, or any signatory employer after the dinner meeting in October concerning the scope of the NMSA or the exclusive jurisdiction of the UA over service work under that Agreement. (Lentz Tr. 82-84; La Mere Tr. 209.) The service work continued to be assigned on a non-exclusive basis as it had been previously without objection or incident.

The surprising silence on the Local level was replicated on the National level. There was no outreach by the PMC to the United Association or MSCA, the multi-employer group responsible for the administration of the Agreement. (Lentz Tr. 82-

83; Braun Tr. 153) Likewise, Local 601 took no steps to request the International to enforce the agreement as far as work jurisdiction. (La Mere Tr. 209.)

V. THE DECISION TO PURSUE THE 10(k) ROUTE

While there was silence and inactivity vis-à-vis Local 601 and the PMC following the dinner meeting, there was plenty of activity between the PMC and Local 18. A meeting was held among PMC contractors and a discussion was reached to resist any attempt, not yet made, to request the reassignment of work by Local 601. (Braun Tr. 156-157.) The first step was to make common cause with Local 18.

Accordingly, on March 1, 2012 Braun and Lentz went to the office of Sheet Metal Workers Local 18 to meet with Business Manager Pat Landgraf. The purpose of this meeting was, according to Lentz, to inform Landgraf of the bad news that Local 601 was, again according to Lentz, claiming exclusive jurisdiction of service work. All agree that Landgraf was not happy with this news. (Lentz Tr. 58.) Lentz and Braun testified that Landgraf immediately suggested that the problem could be resolved through the auspices of the NLRB. Landgraf "talked about remedies they could pursue with regard to settling this jurisdiction question... he brought up that there were ways of dealing with this. (Emphasis added.)" (Lentz Tr. 59.) Landgraf said that there was an alternative, that this dispute could be resolved by a federal agency. (Lentz Tr. 82.) Braun confirmed that Landgraf brought up a way to pursue an NLRB process that would end up at a hearing in which the NLRB would determine who would get the work. (Braun Tr. 158.)

Lentz and Braun go a step further and claim that Landgraf threatened to strike. However, this embellishment must be weighed with the measured testimony of Landgraf who stated that he not issue any threat to picket or strike. (Landgraf Tr. 181.) Landgraf confirmed that he told his employer counterparts that "there were avenues to take care of this, talk to your attorney." (Landgraf Tr. 180.)

Consultation with counsel ensued and discussions were renewed by the PMC and Sheet Metal Workers Local 18 to perfect submitting the dispute to the NLRB. Landgraf spoke to Lentz to discuss what would happen in the 10(k) process. "He said there is a process... where there is a jurisdictional dispute... it pits one union against the other and then a determination is made who gets the work." (Lentz Tr. 83.) Lentz also learned that there would need to be a threat to strike or to take some concerted action. (Lentz Tr. 83-84.) There were discussions that letters would need to be exchanged to get the 10(k) process going (Lentz Tr. 88; Braun Tr. 161). It was understood that these letters were part of the mechanism to trigger a 10(k). (Braun Tr. 162, 173; Lentz Tr. 88, 93, 104, 108.) As stated by Tim Braun, the head of the PMC Labor Committee, the purpose of the initial letter "was to notify Pat Landgraf of the situation here with Local 601 and that we need some action to move forward." (Tr. 162.) Braun confirmed that the goal was to move forward to get a 10(k). (Id.)

These discussions were further illuminated by a remarkable set of e-mails. (See Intervenor Ex. 1.) In reverse order, the first e-mail sent from Peter Lentz on March 14 at 1:01 to the Local 18 Business Manager contained the points to be raised of a "contemplated letter" to be sent from the Sheet Metal & Air Conditioning Contractors' Association of Milwaukee (SMACCA) to Local 18. The contemplated letter was as follows:

SMACCA Milwaukee represents a number of contractors who are signatory to the Local 18 and the Local 601 labor agreements for

the Milwaukee area and who are also signatory to the UA National Service and Maintenance Agreement (NMSA). Local 601 Steamfitters officials have advised the contractors who serve on the association labor committee that the NMSA provides that contractors who are signatory to the NSMA may only use employees represented by UA affiliated unions for service work. Although those contractors have assigned such work to both Local 18 and Local 601 members in the past, and would prefer to continue to do so, SMACCA Milwaukee has taken the position that those NSMA signatory employers should assign such work solely to UA affiliated workers in the future.

Intervenor Ex. 1.

This "contemplated letter" was essentially a letter that was eventually sent on March 21, 2012 to Pat Landgraf. See Charging Party Ex. 1. However, there were differences in the "contemplated letter" and the actual draft. First, the final letter eliminated the language stating that SMACCA had advised signatory contractors that the service work should be assigned solely to UA represented workers in the future. Lentz confirmed that this, in fact, never happened — that SMACCA had never told signatory contractors that they should assign service work exclusively to Local 601 employees. (Lentz Tr. 90.) Despite the dissembling of Lentz on the stand that there was an emerging consensus that this would occur, Braun affirmed that the employers consisting of a large number of overlapping contractors signed to contractors with both Local 601 and Local 18 had determined that they would resist what they perceived as Local 601's claim of exclusive jurisdiction over service work and no contractor was advised to make such work assignment. (Braun Tr. 156.)

What makes this language even more curious was that Pat Landgraf, the Business Manager of Local 18 was told by Lentz, falsely as it turns out, that the contractors

group had informed its members to assign the work exclusively to UA members (Braun Tr. 176.)

The March 14 e-mails sent in rapid succession reveal the scheme to advance this matter to the NLRB. It was clearly recognized that the first letter was merely the first salvo that would prompt a threat to strike. As Lentz testified, "I was talking about writing the letter and that would generate action." (Lentz Tr. 94.) This is revealed in the e-mail sent to Lentz to Landgraf at 2:01 p.m., urging that "the association ought to be the object of such action." Braun confirms that the "object of the action" would be a threat to picket. (Braun Tr. 165.) Braun further testified that he wanted to have control over the initiation of the 10(k) process. (Braun Tr. 171.)

Lentz's initial suggestion that Local 18 direct its threat to the PMC shifted when Tim Braun weighed in by an e-mail sent on 2:20 p.m., that "if you want to make me the scape goat on this one, I'm game for it." *See* Intervenor Ex. 1. He hastened to condition his willingness to be the object of the threat with the caveat: "As long as Local 18 only threatens us with the grievance/shutdown but does not follow through." Braun explained that his e-mail meant that Local 18 could send a threat to picket to his company rather than the Association because his company had the most at stake.

At the hearing both Lentz and Braun attempted to backpedal from this damning admission. Lentz suggested that he "might have" had subsequent phone conversations nowhere reflected in the e-mails, to Lentz where he told Braun that his company was vulnerable to strike. (Lentz Tr. 98.) Braun, while acknowledging that "Hell no" he did not want a strike but that what he meant to say that he didn't want a

strike to be directed solely to his company rather than shutting all contractors down (Braun Tr. 166).

Braun's unease about a possible strike appears to be directed at possible action by Local 601 and not Local 18. In the e-mail sent by Braun to Lentz at 2:32, he states he felt threatened by Local 601's perceived stance that Local 18 employees could not be used "to do the UA work because we signed the UA NSMA [National Agreement]." Intervenor Ex. 1. Braun expressed in the e-mail that he was not comfortable waiting for Local 601 to pull the trigger – notwithstanding that everyone agrees that Local 601 never threatened to strike over this issue – and that the implicit threat of Local 601 action that Braun had conjured up "should be more than enough to start moving forward which will allow us to legally set up the roadblock." (*Id.*) Braun admitted that the roadblock reference in the e-mail was the 10(k) proceeding designed to block any forthcoming action by Local 601. (Braun Tr. 167.)

The suggestion by Braun and Lentz that Total Mechanical felt threatened by both unions is belied by the eagerness of Braun and Lentz to prod Local 18 to send the second letter – the threat to strike. *See* Charging Party Ex. 2. As Lentz stated to Braun in the e-mail sent at 2:45 p.m. on March 14, "I am also a little leary by Pat's reference to not having to go through the 10(k) process. I wouldn't want there to be a failure to pull the trigger to get an official process going. We don't want Local 18 to go wobbly and we end up with mere arguments supported by case law. We need an adjudication. So I agree – we cannot allow Local 18 to dally." Intervenor Ex. 1.

The upshot of these discussions is that it was settled as revealed in the e-mail from Lentz to Braun on March 21 at 11:34 a.m., that the letter first banted about on

March 14 would be sent to Local 18 and that the letter would cite Total Mechanical as an example of a contractor adversely affected. Lentz added: "I'm glad Total has volunteered to be a 'stalking horse." *Id.*

Lentz's e-mail continued that once his letter was sent – and it was that very day – that Local 18 would probably include Total in its response. After the response was sent by Local 18 with the threat to picket, "then Total will be able to demonstrate to the NLRB that it is ensnarled in a jurisdictional dispute." (*Id.*)

So it came to pass. The March 21, 2012 letter was sent by Lentz to Pat Landgraf on March 21, 2012, citing Total Mechanical. Charging Party Ex. 1. Patrick Landgraf fulfilled his part of the bargain by sending the threat to strike letter on March 26, 2012. Charging Party Ex. 2. Per the script, Total Mechanical filed its unfair labor practice charge on April 4, 2012. *See*, Board Ex. 1.

VI. ARGUMENT

A. The Absence of Competing Claims

Underlying Section 8(b)(4)(D) is the requirement of competition over a specific type of work between two or more unions. The NLRB has held, with Supreme Court approval, that "Sections 8(b)(4)(D) and 10(k) were designed to resolve competing claims between rival groups of employees and not to arbitrate disputes between a union and an employer where no such competing claims are involved." Safeway Stores, Inc., 134 NLRB 1320, 1322 (1961); NLRB v. Plasterers Local 79 (Southwestern Constr. Co.), 404 U.S. 116, 134 n.30 (1971). It is clear that Section 10(k) seeks to protect an employer from being enmeshed between two unions seeking the assignment of work. "There must, in short, be either an attempt to take a work

assignment away from another group, or to obtain the assignment rather than have it given to the other group." Food & Commercial Workers Local 1222 (Fed Mart Stores), 262 NLRB 817, 819 (1982). The Board's 10(k) processes are not designed for theoretical or possible competing claims for work assignments; actual competing claims for work assignments must exist.

The nub of this controversy arises from statements made during a dinner meeting on February 21, 2012. Boiled down to their essence, Kevin La Mere, the Business Manager of Fitters Local 601 simply stated the obvious – that the UA NSMA covered service work. This same statement could have been made as regards to the Local 601 contract or for that matter, the Local 18 contract.³

The PMC representatives immediately and mistakenly jumped to the conclusion that this was a request for the assignment of that work to Local 601 employees on an exclusive basis. However, no request for such assignment was made. (Zielke Tr. 199); (La Mere Tr. 209.) One of the contractors asked what would happen to the existing Local 18 service employees if such exclusive assignment was made. La Mere responded that in such an event that the Local 601 could take the Local 18 service employees into Local 18 as part of its organizing program in order to assure continuity and avoid disruption. (La Mere Tr. 210.)

La Mere's statement caused stunned silence. There was no discussion either at this meeting by and between representatives of Local 601 and the PMC or individual

³ Compare, Paragraph 11 of NSMA covering all work "to keep existing mechanical, refrigeration, and plumbing systems within occupied facilities operating in an efficient manner. This work shall include the inspection, service, maintenance...repair, modification and replacement of mechanical refrigeration or plumbing equipment..." JT Ex. 1 with Part B of Local 601 Agreement, Section 31.1 which states that "This Agreement covers...all Employees engaged in the installation and service of all refrigeration, HVAC and mechanical systems. JT Ex. 3 and Article I, Section 1 of the Local 18 Agreement covering all "conditioning, adjustment, alteration and servicing...and all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

employers about this statement. (Lentz Tr. 56.) This statement, however, caused the PMC and Total Mechanical, as will be shown, to work furiously behind the scenes to channel the prospective or potential dispute into the 10(k) process.

The record could not be clearer, however, that La Mere never made any statement that the work had to be exclusively assigned to Local 601 employees. La Mere couched his remarks concerning his "opinion" of the scope of the UA National Agreement. (La Mere Tr. 208; Zielke Tr. 199.) La Mere interpreted that agreement as covering service work, and that the use of Local 18 service employees, the EST classification, would be prohibited by signatory contractors to the National Agreement. (La Mere Tr. 208.) La Mere, however filed no grievance and took no action to effectuate his interpretation of the National Agreement (La Mere Tr. 208-209.) Specifically, La Mere did not contact any employer to tell them that the service work performed by EST's should be reassigned to Local 601 employees (La Mere Tr. 209.)

The employers jumped the gun in their fear of what might happen sometime in the future. As stated by Braun in the March 14, 2012 e-mail sent to Lentz on March 14, at 2:32 p.m., "I do not feel comfortable waiting for them [Local 601] to pull the trigger..." See Intervenor Ex. 1. But 10(k) processes are not to be used to adjudicate potential claims, there must be actual claims. The Board has Quashed Notice of Hearings where "the correspondence among the Unions did not ripen into competing claims for the work." Local Union 522, International Brotherhood of Teamsters (S, Kraus, Inc.), 307 NLRB 479, 480 (1992). The same result is necessary under the facts of this case. Local 601 has stated its interpretation of a National Agreement – an

agreement that the Local does not negotiate or administer. (La Mere Tr. 204.) The interpretation advanced by Local 601 was not acceded to by the employer association (Lentz Tr. 78.) However, the employer group did not reach out to the United Association or the Mechanical Contractors Service Association, the parties to the agreement to seek guidance on which interpretation is correct. (Lentz Tr. 80-81; Braun Tr. 154.) Instead the employers have contrived to initiate a 10(k) in order to obtain a Board order confirming their interpretation of the National Agreement. This is an abuse of the 10(k) process which was never designed to give advisory opinions or to resolve conflicting opinions on the scope of a contract. "The Board has repeatedly held that Sections 8(b)(4)(D) and 10(k) of the Act was intended to deal with disputes between two or more competing employee groups claiming the right to perform certain tasks, and not situations, as here, where there is a lack of competing claims." Local Union 522, supra; Teamsters Local 839 (Shurtleff & Andrews Constr.), 249 NLRB 176, 177 (1980).

The Board has also held that an attempt to secure compliance with a contract does not constitute a claim for work. Such contractual enforcement efforts are "wholly devoid of a meaningful demand. To regard this as a jurisdictional dispute in the statutory sense is to distort the Congressional intent for the employer-members of MCA were not truly caught between rival claims contemplated by Section 8(b)(4)(D) of the Act." *Pipe Fitters Local No. 120 (Mechanical Contractors Assoc. of Cleveland*), 168 NLRB 997, 998 (1967).

Nor can the employer equate the response of La Mere to what would happen if the employers agreed to his interpretation of the National Agreement as a competing claim for the work. La Mere responded to this hypothetical that in that event the employers decided to exclusively assign the work to Local 601, then Local 601 would organize the EST's (La Mere Tr. 210.) The record is clear that no steps have been taken to organize the EST's (La Mere Tr. 211.) But if that had occurred, organizing is not tantamount to a claim for work under Section 8(b)(4) and 10(k) of the Act. The Board has held that where the essence of a dispute is whether one union rather than another will represent a group of employees, the matter is not a jurisdictional dispute within the meaning of Section 10(k) and therefore the notice of hearing must be quashed. Missouri and Kansas Bricklayers Union No. 15 (Jacor Contracting, Inc.), 340 NLRB 304, 306 (2003); Carpenters Local 275 (Lymos Construction), 334 NLRB 422 (2001). Where one union is not seeking to displace one group of employees but seeking to represent those employees, the dispute is not properly within the purview of 10(k) of the Act. "Sections 8(b)(4)(D) and 10(k) were not intended to cover situations such as this one where the dispute is essentially between the Union and the employer rather than between rival groups of employees, and where the essence of the dispute is representational rather than jurisdictional." Local 421, Glass, Molders International Union (A-CMI Michigan Casting Center), 324 NLRB 670, 674 (1997).

B. There is No Bona Fide Threat Necessary For a 10(k) Hearing

In addition to failing to satisfy the requisite of the existence of two bona fide conflicting claims over the work, it must be shown that one or more of the competing unions has engaged in proscribed means to attempt to secure the work assignment. Section 8(b)(4) covers activity to "threaten, coerce, or restrain" with the goal of forcing a person to assign work in a certain way. Coercive activity is defined as "non

judicial acts of a compelling or restraining nature, applied by way of concerted self help consisting of a strike, picketing, or other economic retaliation or pressure in a background of a labor dispute." *Sheet Metal Workers Local 48 v. Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. 1964). In deciding whether threats, coercion or restraint has occurred under Section 8(b)(4) the Board applies an objective standard: whether a reasonable person would have been coerced under the circumstances by the union conduct. *Stokvis Multi-Ton Corp.*, 243 NLRB 340, n.7 (1979).

It follows, of course, that a threat must be genuine and not contrived or the product of collusion. An illicit arrangement between one union and an employer to manufacture a threat deprives the Board of jurisdiction over the supposed work assignment dispute. As stated by the United States Court of Appeals for the District of Columbia:

If an employer is a signatory to an impermissible agreement to assign work for a reason unrelated to job performance, he does not face a 'dispute not of his own making and in which he has no interest'...ILWV Local 62-B v. NLRB, 781 F.2d 919, 924 (D.C. Cir. 1986). Such dispute is not within the Board's § 10k jurisdiction, Construction and General Laborers Union Local 190 v. NLRB, 998 F.2d 1064 (D.C. Cir. 1993).

The existing case demonstrates that the employer was not caught in the middle of two contesting unions. Rather, the facts overwhelmingly show that the employer joined forces with Sheet Metal Workers Local 18 with the avowed intent to create the false impression of a threat in order to use the Board's 10(k) process to throw a roadblock to the contractual interpretation of the UA NSMA advanced by Local 601.

The employers met with Local 18 soon after Local 601 had announced its opinion concerning the interpretation of the NMSA as requiring exclusive assignment

of all EST (Sheet Metal employees) work to the UA. Not content to wait to see if and how Local 601 would act on this opinion concerning the interpretation of the contract, the PMC met with Local 18 to give them the "bad news." (Tr. 58.) The employers put their own spin on the statement by the Local 601 Business Manager concerning the scope of the National Agreement. First, Lentz and Braun, at the meeting held on March 1, 2012, mischaracterized La Mere's statement by telling the Business Manager of Local 18 that Local 601 had sought the assignment of service work on an exclusive basis. Second, they told Local 18, falsely, that the employers association had reluctantly recommended that the work be assigned to Local 601 on an exclusive basis. See Intervenor Ex. 1, e-mail dated March 14, 1:01 p.m. from Lentz to Landgraf. (Landgraf Tr. 183.)

Despite this provocative and misleading statement, Patrick Landgraf accepted the news calmly and told the employer emissaries that there was an alternative mechanism to resolve the dispute by channeling the controversy to the NLRB pursuant to a 10(k) hearing. Despite the unconvincing testimony of Lentz and Braun that this initial meeting resulted in a strike threat, Landgraf — who certainly had no reason to lie — confirmed that no such threat was made. (Landgraf Tr. 181.) Instead, Landgraf who has experience with a prior 10(k), advised that both sides should consult with counsel on how to get a 10(k).

The suggestion by Lentz and Braun that a threat had occurred at the March 1 meeting is not only flatly contradicted by the testimony of Landgraf – it is also belied by the fact that Lentz and Braun sought to hold Local 18's feet to the fire to issue a letter containing a threat and fretted over the possibility that Local 18 would lose its

enthusiasm or "dally" in issuing an ostensible threatening letter. *See* Intervenor Ex. 1, e-mail dated March 14, 2:45 p.m. The unfair labor practice charge filed by Total Mechanical states that a threat was made to picket by Local 18 in the letter from Local 18 dated March 26, 2012. However, the unfair labor practice charge contains no assertion that a threat was made on March 1, 2012. *See* NLRB Board Ex. 1.

The incriminating chain of e-mails show that Lentz and his designated "stalking horse", ⁴ Total Mechanical, was not innocent bystander caught in the middle of a dispute between two unions. Rather, Total Mechanical was an active participant in the scheme to manufacture a dispute to be submitted to the NLRB 10(k) process. Lentz and Braun colluded with Landgraf in the sequence of letters to be sent as well as the company that would be singled out for the object of the "threat", all for the avowed purpose of channeling this dispute over an interpretation of the contract to the Board's 10(k) process.

The e-mail sent by Tim Braun to Peter Lentz at 2:20 p.m. on March 14 is devastating. Braun states in that e-mail: "Peter if you want to make me the scape goat on this one I'm game for it. As long as Local 18 only threatens us with the grievance/shutdown but does not follow through." Intervenor Ex. 1. The attempt to explain away this admission by both Lentz and Braun is utterly unavailing. Their rationalizations do not match. Lentz claims he told Braun nowhere reflected in the e-mail chain – that he was vulnerable to a strike from both Local 601 and Local 18. Braun's story is different, he says that he was concerned that he not be the only contractor subject to a strike.

⁴ "Stalking horse" the term used in Lentz's e-mail to Braun dated March 14, 2012 at 11:34 is defined by the American Heritage Dictionary to mean, "Something used to cover one's true purpose; a decoy; 2. A sham candidate put forward to divide the opposition."

As stated earlier, it strains credulity that Braun and Lentz would actively push Local 18 to send a letter and to make Total Mechanical "the object of such action" if they thought the threat was real. In addition, the e-mail of 2:32 p.m., on March 14 shows that Braun was not concerned with a strike from both unions, rather his focus was solely on Local 601. Braun did "not feel comfortable with waiting for them [Local 601] to pull the trigger when I need all hands on deck which is just around the corner. Therefore, this threat [from Local 601] should be more than enough to start moving forward which will allow us to legally set up the roadblock [via the 10(k) proceeding]." *Id.*

The raging paranoia over Local 601's unexpressed intentions was no doubt a product of hard feelings from past strikes by Local 601 or the illegal lockout by Total Mechanical and other contractors against Local 601. *See* Intervenor Ex. 2. However, there was no basis for finding that Local 601 issued any threats or engaged in any coercive or restraining conduct against Total Mechanical or any of the other signatories to the UA NSMA. Indeed, Region 30, after an investigation of the 8(b)(4) charges filed by Total Mechanical alleging that both Locals 601 and Local 18 had engaged in coercive conduct, found no cause for alleging that Local 601 had engaged in proscribed conduct.

The attempt by Total Mechanical, the employer association, and Sheet Metal Workers Local 18 to gin up this dispute should not be countenanced. The facts show that Sheet Metal Workers Local 18 acted in concert with Total Mechanical to attempt to manufacture a dispute that was contrived and wholly lacking in a bona fide threat necessary for the NLRB to take jurisdiction in a 10(k) case. The Board must look past

the two letters, Charging Party Exs. 1 and 2, to carefully examine the e-mails and the testimony. When an employer acts in concert with one of the supposed competing unions and the threat is not bona fide, the NLRB must conclude that it has no jurisdiction to make a determination. Under the facts of this case, the Board must quash the notice of hearing.

VII. <u>CONCLUSION</u>

For all the reasons set forth in this brief, Steamfitters Local 601 respectfully requests that the NLRB Quash the Notice of Hearing issued in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Intervenor Brief on behalf of Local Union 601 Steamfitters and Refrigeration/Service Fitters that was e-filed with the NLRB Executive Secretary on May 14, 2012, has also been sent via e-mail to the Regional Director of Region 30 and to counsel for Charging Party: Thomas W. Scrivner and Counsel for the Charged Party, Nicholas E. Fairweather at addresses below.

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